

PART 42

CONTRACT ADMINISTRATION

☞ When authorized by the contracting office, Contract Administration Offices evaluate contractor performance per Subpart 42.15.

42.302 Contract administration functions.

<i>FAR as of FAC 90-25</i>	<i>FAR as revised</i>
(a) * * * * *	(a) * * * * *
(12) Review and approve or disapprove the contractor's requests for payments under the progress payments clause. * * * * *	(12) Review and approve or disapprove the contractor's requests for payments under the progress payments or performance-based payments clauses. * * * * * [FAC 90-33]
(52) Review, evaluate, and approve plant or division-wide small and small disadvantaged business master subcontracting plans.	(52) Review, evaluate, and approve plant or division-wide small, small disadvantaged and women-owned small business master subcontracting plans. [FAC 90-32]
(53) Obtain the contractor's currently approved company- or division-wide plans for small business and small disadvantaged-business subcontracting for its commercial products , or, if there is no currently approved plan, assist the contracting officer in evaluating the plans for those products.	(53) Obtain the contractor's currently approved company- or division-wide plans for small, small disadvantaged and women-owned small business subcontracting for its commercial items , or, if there is no currently approved plan, assist the contracting officer in evaluating the plans for those products. [FAC 90-32]
(54) Assist the contracting officer, upon request, in evaluating an offeror's proposed small business and small disadvantaged business subcontracting plans, including documentation of compliance with similar plans under prior contracts.	(54) Assist the contracting officer, upon request, in evaluating an offeror's proposed small, small disadvantaged and women-owned small business subcontracting plans, including documentation of compliance with similar plans under prior contracts. [FAC 90-32]
(55) By periodic surveillance, ensure the contractor's compliance with small business and small disadvantaged business subcontracting plans and any labor surplus area contractual requirements; maintain documentation of the contractor's performance under and compliance with these plans and requirements; and provide advice and assistance to the firms involved, as appropriate. * * * * *	(55) By periodic surveillance, ensure the contractor's compliance with small, small disadvantaged and women-owned small business subcontracting plans and any labor surplus area contractual requirements; maintain documentation of the contractor's performance under and compliance with these plans and requirements; and provide advice and assistance to the firms involved, as appropriate. * * * * * [FAC 90-32]

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(68) Monitor the contractor's compliance with the requirements of environmental laws including the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6901, et seq.) and other environmental requirements as specified in the contract (see Part 23). Responsibilities of the contracting officer shall include—

(i) Verification of contractor compliance with specifications requiring the use of environmentally preferable and energy-efficient materials and the use of materials or delivery of end items with the specified recovered material content. This shall occur as part of the quality assurance procedures set forth in Part 46.

(ii) As required in the contract, ensuring that the contractor complies with the reporting requirements relating to recovered material content utilized in contract performance. [FAC 90-27]

(69) Administer commercial financing provisions and monitor contractor security to ensure its continued adequacy to cover outstanding payments, when on-site review is required. [FAC 90-33]

(b) The CAO shall perform the following functions only when and to the extent specifically authorized by the contracting office:

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(b) The CAO shall perform the following functions only when and to the extent specifically authorized by the contracting office:

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(11) Prepare evaluations of contractor performance in accordance with Subpart 42.15 [FAC 90-26]

42.501 General.

FAR as of FAC 90-25

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(b) Postaward orientation is encouraged to assist small business ~~and~~ small disadvantaged business concerns (see Part 19).

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FAR as revised

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(b) Postaward orientation is encouraged to assist small business, small disadvantaged **and women-owned small** business concerns (see Part 19).

* * * * * [FAC 90-32]

42.502 Selecting contracts for postaward orientation.

FAR as of FAC 90-25

When deciding whether postaward orientation is necessary and, if so, what form it shall take, the contracting officer shall consider, as a minimum, the—

* * * * *

(i) Contractor's status, if any, as a small business ~~or~~ small disadvantaged business concern;

(j) Contractor's performance history with small ~~business and~~ small disadvantaged business subcontracting programs;

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FAR as revised


When deciding whether postaward orientation is necessary and, if so, what form it shall take, the contracting officer shall consider, as a minimum, the—

* * * * *

(i) Contractor's status, if any, as a small business, small disadvantaged **or women-owned small** business concern; [FAC 90-32]

(j) Contractor's performance history with small, small disadvantaged **and women-owned small** business subcontracting programs;


* * * * * [FAC 90-32]

 Past performance information is information that is relevant to future source selections on a contractor's actions under previously awarded contracts. Record information on such matters as the contractor's

- Record of conforming to contract requirements and to standards of good workmanship
- Record of forecasting and controlling costs.
- Adherence to contract schedules, including the administrative aspects of performance.
- History of reasonable and cooperative behavior and commitment to customer satisfaction.

Business-like concern in general for the interest of the customer.

(FAR subpart 42.15, FAC 90-26)

 When work on the contract is completed, prepare an evaluation of contractor performance for each contract in excess of:


- \$1,000,000 beginning July 1, 1995,
- \$500,000 beginning July 1, 1996, and
- \$100,000 beginning January 1, 1998

Also prepare interim evaluations for multiple year contracts as specified by the agency.

Exceptions:

- Contracts awarded under Subparts 8.6 and 8.7
- Construction and A&E contracts (see §36.201 and 36.604 for policies on recording performance under such contracts).

(FAR subpart 42.15, FAC 90-26)

 Generally solicit input for the evaluations from the technical office, contracting office, and, where appropriate, end users of the product or service.

(FAR subpart 42.15, FAC 90-26)

☞ Provide copies of the agency evaluation of the contractor's performance to the contractor as soon as practicable after completing the evaluation. Give the contractor at least 30 days to comment on the evaluation. If the parties disagree about the evaluation, refer the evaluation to a level above the contracting officer. However, the contracting agency makes the final decision.

(FAR subpart 42.15, FAC 90-26)

☞ Retain copies of the evaluation, contractor response, and review comments (if any) and mark this information with the legend "Source Selection Information." Only release the evaluation to other Government personnel and the contractor whose performance is being evaluated.

(FAR subpart 42.15, FAC 90-26)

☞ Destroy the evaluation within three years after completion of contract performance.

(FAR subpart 42.15, FAC 90-26)

SUBPART 42.15—CONTRACTOR PERFORMANCE INFORMATION

[added by FAC 90-26]

42.1500 Scope of subpart.

This subpart provides policies and establishes responsibilities for recording and maintaining contractor performance information. It implements Office of Federal Procurement Policy Letter 92-5, Past Performance Information. This subpart does not apply to procedures used by agencies in determining fees under award or incentive fee contracts. However, the fee amount paid to contractors should be reflective of the contractor's performance and the past performance evaluation should closely parallel the fee determinations.

42.1501 General.

Past performance information is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts. It includes, for example, the contractor's record of conforming to contract requirements and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the contractor's business-like concern for the interest of the customer.

42.1502 Policy.

(a) Except as provided in paragraph (b) of this section, agencies shall prepare an evaluation of contractor performance for each contract in excess of \$1,000,000 beginning July 1, 1995, \$500,000 beginning July 1, 1996, and \$100,000 beginning January 1, 1998, (regardless of the date of contract award) at the time the work under the contract is completed. In addition, interim evaluations should be prepared as specified by the agencies to provide current information for source selection purposes, for contracts with a period of performance, including options, exceeding one year. This evaluation is generally for the entity, division, or unit that performed the contract. The content and format of performance evaluations shall be established in accordance with agency procedures and should be tailored to the size, content, and complexity of the contractual requirements.

(b) Agencies shall not evaluate performance for contracts awarded under Subparts 8.6 and 8.7. Agencies shall evaluate construction contractor performance and architect/engineer contractor performance in accordance with 36.201 and 36.604, respectively.

42.1503 Procedures.

(a) Agency procedures for the past performance evaluation system shall generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service.

(b) Agency evaluations of contractor performance prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information. Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the contracting agency. Copies of the evaluation, contractor response, and review comments, if any, shall be retained as part of the evaluation. These evaluations may be used to support future award decisions, and should therefore be marked "Source Selection Information". The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information may be used to provide source selection information. Disclosure of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations. Evaluations used in determining award or incentive fee payments may also be used to satisfy the requirements of this subpart.

(c) Departments and agencies shall share past performance information with other departments and agencies when requested to support future award decisions. The information may be provided through interview and/or by sending the evaluation and comment documents to the requesting source selection official.

(d) Any past performance information systems, including automated systems, used for maintaining contractor performance information and/or evaluations should include appropriate management and technical controls to ensure that only authorized personnel have access to the data.

(e) The past performance information shall not be retained to provide source selection information for longer than three years after completion of contract performance.



The FAR now requires that contracting officers use, not merely take into consideration, established final indirect cost rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established. [§42.703-1, FAC 90-31]

42.703-1 Policy.

FAR as of FAC 90-25

FAR as revised

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(c) Contracting officers shall—
(1) Unless the quick-closeout procedure in 42.708 is used, use final indirect cost rates of a business unit for a given period, which shall be binding for all the cost-reimbursement contracts of the business unit for that period, subject to any

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(c) Contracting officers shall—
(1) Unless the quick-closeout procedure in 42.708 is used, use final indirect cost rates of a business unit for a given period, which shall be binding for all the cost-reimbursement contracts of the business unit for that period, subject to any

specific limitation in a contract or advance agreement (when contracts of more than one agency are involved, see 42.101(c)); and

(2) ~~Take into consideration~~ established final indirect cost rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established ~~(see 31.103(b))~~.


specific limitation in a contract or advance agreement (when contracts of more than one agency are involved, see 42.101(c)); and

(2) **To ensure compliance with 10 U.S.C. 2324(a) and 41 U.S.C. 256(a),** use established final indirect cost rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established.


 Section 42.703-2 extends requirements for contractor certification of indirect cost rates (both billing and final) to the civilian agencies. Pursuant to 10 U.S.C. 2324(h), the Department of Defense already determines or negotiates contractor indirect cost rates on the basis of a certified proposal. Basically, contracting officers may not agree to billing or final indirect cost rates unless the contractor has certified (using the clause at 52.242-4, Certification of Indirect Costs) that:

- All proposed costs are allowable
- None are unallowable, AND
- All costs included in the proposal are properly allocable to Government contracts on the basis of a beneficial or causal relationship between the expenses incurred and the contracts to which they are allocated in accordance with applicable acquisition regulations.

(FAR 42.703-1 and 52.242-4, FAC 90-31)

 The head of the agency or designee may waive the certification when in the interest of the United States. However, they must put the reasons for the waiver in writing and make those reasons available to the public. For example, waivers might be appropriate for contracts with foreign governments, international organizations, State or local governments subject to OMB circular A-87, educational institutions subject to OMB circular A-21, and non-profit organizations subject to OMB circular A-122.

(FAR 42.703-1, FAC 90-31)

 If necessary for continuation of the contract, contracting officers can unilaterally establish the rates if the contractor fails to certify its proposal for billing or indirect cost rates.

(FAR 42.703-1, FAC 90-31)

42.703-2 Certificate of indirect costs. [FAC 90-31]

(a) **General.** In accordance with 10 U.S.C. 2324(h) and 41 U.S.C. 256(h), a proposal shall not be accepted and no agreement shall be made to establish billing rates or final indirect cost rates unless the costs have been certified by the contractor.

(b) **Waiver of certification.** (1) The agency head, or designee, may waive the certification requirement when—

(i) It is determined to be in the interest of the United States; and

(ii) The reasons for the determination are put in writing and made available to the public.

(2) A waiver may be appropriate for a contract with—

(i) A foreign government or international organization, such as a subsidiary body of the North Atlantic Treaty Organization;

(ii) A state or local government subject to OMB Circular A-87;

(iii) An educational institution subject to OMB Circular A-21; and

(iv) A nonprofit organization subject to OMB Circular A-122.

(c) *Failure to certify.* (1) If the contractor has not certified its proposal for billing rates or indirect cost rates and a waiver is not appropriate, the contracting officer shall unilaterally establish the rates if they are necessary for continuation of the contract.

(2) Rates established unilaterally should be—

(i) Based on audited historical data or other available data as long as unallowable costs are excluded; and

(ii) Set low enough to ensure that potentially unallowable costs will not be reimbursed.

(d) *False certification.* The contracting officer should consult with legal counsel to determine appropriate action when a contractor certificate of indirect costs is thought to be false.

(e) *Penalties for unallowable costs.* 10 U.S.C. 2324(a) through (d) and 41 U.S.C. 256(a) through (d) prescribe penalties for submission of unallowable costs in final indirect cost rate proposals (see 42.709 for penalties and contracting officer responsibilities).

(f) *Contract clause.* (1) Except as provided in paragraph (f)(2) of this subsection, the clause at 52.242-4, Certification of Indirect Costs, shall be incorporated into all solicitations and contracts which provide for—

(i) Interim reimbursement of indirect costs;

(ii) Establishment of final indirect cost rates; or

(iii) Contract financing that includes interim payment of indirect costs, *e.g.*, progress payments based on cost (Subpart 32.5) or progress payments based on percentage or stage of completion.

(2) The Department of Energy may provide an alternate clause in its agency supplement for its Management and Operating contracts.

52.242-4 Certification of Indirect Costs.

As prescribed in 42.703-2(f), insert the following clause:

CERTIFICATION OF INDIRECT COSTS (OCT 1995)

(a) The Contractor shall—

(1) Certify any proposal to establish or modify billing rates or to establish final indirect cost rates;

(2) Use the format in paragraph (c) of this clause to certify; and

(3) Have the certificate signed by an individual of the Contractor's organization at a level no lower than a vice president or chief financial officer of the business segment of the Contractor that submits the proposal.

(b) Failure by the Contractor to submit a signed certificate, as described in this clause, shall result in payment of indirect costs at rates unilaterally established by the Government.

(c) The certificate of indirect costs shall read as follows:

CERTIFICATE OF INDIRECT COSTS

This is to certify that to the best of my knowledge and belief:

1. I have reviewed this indirect cost proposal;

2. All costs included in this proposal (*identify proposal and date*) to establish billing or final indirect cost rates for (*identify period covered by rate*) are allowable in accordance with the requirements of contracts to which they apply and with the cost principles of the Federal Acquisition Regulation (FAR) and its supplements applicable to those contracts;

3. This proposal does not include any costs which are unallowable under applicable cost principles of the FAR or its supplements, including, but not limited to: advertising and public relations costs, contributions and donations, entertainment costs, fines and penalties, lobbying costs, defense of fraud proceedings, and goodwill; and

4. All costs included in this proposal are properly allocable to Government contracts on the basis of a beneficial or causal relationship between the expenses incurred and the contracts to which they are allocated in accordance with applicable acquisition regulations.

I declare under penalty of perjury that the foregoing is true and correct.

Firm: _____


Signature: _____

Name of Certifying Official: _____

Title: _____

Date of Execution: _____

(End of clause)

 If the contracting officer is responsible for determining final indirect cost rates, the FAR prohibits the contracting officer from resolving any questioned costs until obtaining—

- Adequate documentation on the costs; and
- The contract auditor's opinion on the allowability of the costs.

The FAR further advises contracting officers, whenever possible, to invite the contract auditor to serve as an advisor at any negotiation or meeting with the contractor on the determination of the contractor's final indirect cost rates.

Finally, the FAR adds a specific requirement that the contracting officer notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance.

[FAR 42.705-1, FAC 90-31]

42.705-1 Contracting officer determination procedure.

FAR as of FAC 90-25

FAR as revised

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(b) *Procedures.* (1) In accordance with the Allowable Cost and Payment clause at 52.216-7 or 52.216-13, the contractor shall submit to the contracting officer and, if required by agency procedures, to the cognizant auditor a final indirect cost rate proposal reflecting actual cost experience during the covered period, together with supporting cost or pricing data.

* * * * *

(b) *Procedures.* (1) In accordance with the Allowable Cost and Payment clause at 52.216-7 or 52.216-13, the contractor shall submit to the contracting officer and, if required by agency procedures, to the cognizant auditor a final indirect cost rate proposal reflecting actual cost experience during the covered period, together with supporting cost or pricing data.

(2) The auditor shall submit to the contracting officer an advisory audit report (i) identifying any relevant advance agreements or restrictive terms of specific contracts and (ii) including the information required by 15.805-5(e).

(3) The contracting officer shall head the Government negotiating team, which includes the cognizant auditor and technical or functional personnel as required. Contracting offices having significant dollar interest shall be invited to participate in the negotiation and in the preliminary discussion of critical issues. Individuals or offices that have provided a significant input to the Government position should be invited to attend.

(4) The Government negotiating team shall develop a negotiation position.

(5) The cognizant contracting officer shall—

(i) Conduct negotiations;

(ii) Prepare a written indirect cost rate agreement conforming to the requirements of the contracts;

(iii) Prepare, sign, and place in the contractor general file (see 4.801(c)(3)) a negotiation memorandum covering (A) the disposition of significant matters in the advisory audit report, (B) reconciliation of all costs questioned, with identification of items and amounts allowed or disallowed in the final settlement as well as the disposition of period costing or allocability issues, (C) reasons why any recommendations of the auditor or other Government advisors were not followed, and (D) identification of cost or pricing data submitted during the negotiations and relied upon in reaching a settlement; and

(iv) Distribute resulting documents in accordance with 42.706.

(2) The auditor shall submit to the contracting officer an advisory audit report (i) identifying any relevant advance agreements or restrictive terms of specific contracts and (ii) including the information required by 15.805-5(e).

(3) The contracting officer shall head the Government negotiating team, which includes the cognizant auditor and technical or functional personnel as required. Contracting offices having significant dollar interest shall be invited to participate in the negotiation and in the preliminary discussion of critical issues. Individuals or offices that have provided a significant input to the Government position should be invited to attend.

(4) The Government negotiating team shall develop a negotiation position. **Pursuant to 10 U.S.C. 2324(f) and 41 U.S.C. 256(f), the contracting officer shall—**

(i) Not resolve any questioned costs until obtaining—

(A) Adequate documentation on the costs; and

(B) The contract auditor's opinion on the allowability of the costs.

(ii) Whenever possible, invite the contract auditor to serve as an advisor at any negotiation or meeting with the contractor on the determination of the contractor's final indirect cost rates.

(5) The cognizant contracting officer shall—

(i) Conduct negotiations;

(ii) Prepare a written indirect cost rate agreement conforming to the requirements of the contracts;

(iii) Prepare, sign, and place in the contractor general file (see 4.801(c)(3)) a negotiation memorandum covering (A) the disposition of significant matters in the advisory audit report, (B) reconciliation of all costs questioned, with identification of items and amounts allowed or disallowed in the final settlement as well as the disposition of period costing or allocability issues, (C) reasons why any recommendations of the auditor or other Government advisors were not followed, and (D) identification of cost or pricing data submitted during the negotiations and relied upon in reaching a settlement; and

(iv) Distribute resulting documents in accordance with 42.70.

(v) Notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance.

☞ Sections 2101 and 2151 of the Federal Acquisition Streamlining Act of 1994 change the contract value threshold for assessment of penalties on unallowable costs from \$100,000 to \$500,000 and expand the coverage from the Department of Defense to all executive agencies. With the exception of the threshold value, the penalty provisions in the new law are the same as those implemented in the current Defense Federal Acquisition Regulation Supplement.

(FAR 42.709 and 52.242-3, FAC 90-31)

☞ Contracting officers may assess penalties against contractors for including unallowable indirect costs in—

- Final indirect cost rate proposals; or
- The final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

However, this policy only applies to contracts in excess of \$500,000 — and does NOT apply to fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of commercial items.

(FAR 42.709 and 52.242-3, FAC 90-31)

☞ The penalty is equal to the amount of the disallowed costs plus interest on the paid portion, if any, of the disallowance. However, if the indirect cost was determined to be unallowable for that contractor before proposal submission, the penalty is double that amount. Any of the following may constitute evidence of prior determinations of unallowability:

- A DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency.
- A contracting officer final decision which was not appealed.
- A prior executive agency Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance.
- A determination or agreement of unallowability under 31.201-6.

(FAR 42.709 and 52.242-3, FAC 90-31)

☞ Determinations of penalty amounts under paragraphs (d) and (e) of the clause at 52.242-3 are final decisions within the meaning of the Contract Disputes Act of 1978. The FAR contains precise instructions for determining the amount of the interest, issuing assessments, and waiving the penalty.

(FAR 42.709 and 52.242-3)

42.709 Scope.

(a) This section implements 10 U.S.C. 2324(a) through (d) and 41 U.S.C. 256(a) through (d). It covers the assessment of penalties against contractors which include unallowable indirect costs in—

- (1) Final indirect cost rate proposals; or**
(2) The final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

(b) This section applies to all contracts in excess of \$500,000, except fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of commercial items.

42.709-1 General.

(a) The following penalties apply to contracts covered by this section:

(1) If the indirect cost is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the penalty is equal to—

(i) The amount of the disallowed costs allocated to contracts that are subject to this section for which an indirect cost proposal has been submitted; plus

(ii) Interest on the paid portion, if any, of the disallowance.

(2) If the indirect cost was determined to be unallowable for that contractor before proposal submission, the penalty is two times the amount in paragraph (a)(1)(i) of this section.

(b) These penalties are in addition to other administrative, civil, and criminal penalties provided by law.

(c) It is not necessary for unallowable costs to have been paid to the contractor in order to assess a penalty.

42.709-2 Responsibilities.

(a) The cognizant contracting officer is responsible for—

(1) Determining whether the penalties in 42.709-1(a) should be assessed;

(2) Determining whether such penalties should be waived pursuant to 42.709-5;
and

(3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted unallowable costs.

(b) The contract auditor, in the review and/or the determination of final indirect cost proposals for contracts subject to this section, is responsible for—

(1) Recommending to the contracting officer which costs may be unallowable and subject to the penalties in 42.709-1(a);

(2) Providing rationale and supporting documentation for any recommendation; and

(3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted unallowable costs.

42.709-3 Assessing the penalty.

Unless a waiver is granted pursuant to 42.709-5, the cognizant contracting officer shall—

(a) Assess the penalty in 42.709-1(a)(1), when the submitted cost is expressly unallowable under a cost principle in the FAR or an executive agency supplement that defines the allowability of specific selected costs; or

(b) Assess the penalty in 42.709-1(a)(2), when the submitted cost was determined to be unallowable for that contractor prior to submission of the proposal. Prior determinations of unallowability may be evidenced by—

(1) A DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency;

(2) A contracting officer final decision which was not appealed;

(3) A prior executive agency Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance; or

(4) A determination or agreement of unallowability under 31.201-6.

(c) Issue a final decision (see 33.211) which includes a demand for payment of any penalty assessed under paragraph (a) or (b) of this section. The letter shall state that the determination is a final decision under the Disputes clause of the contract.

(Demanding payment of the penalty is separate from demanding repayment of any paid portion of the disallowed cost.)

42.709-4 Computing interest.

For 42.709-1(a)(1)(ii), compute interest on any paid portion of the disallowed cost as follows:

(a) Consider the overpayment to have occurred, and interest to have begun accumulating, from the midpoint of the contractor's fiscal year. Use an alternate equitable method if the cost was not paid evenly over the fiscal year.

(b) Use the interest rate specified by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97).

(c) Compute interest from the date of overpayment to the date of the demand letter for payment of the penalty.

(d) Determine the paid portion of the disallowed costs in consultation with the contract auditor.

42.709-5 Waiver of the penalty.

The cognizant contracting officer shall waive the penalties at 42.709-1(a) when—

(a) The contractor withdraws the proposal before the Government formally initiates an audit of the proposal and the contractor submits a revised proposal (an audit will be deemed to be formally initiated when the Government provides the contractor with written notice, or holds an entrance conference, indicating that audit work on a specific final indirect cost proposal has begun);

(b) The amount of the unallowable costs under the proposal which are subject to the penalty is \$10,000 or less (i.e., if the amount of expressly or previously determined unallowable costs which would be allocated to the contracts specified in 42.709(b) is \$10,000 or less); or

(c) The contractor demonstrates, to the cognizant contracting officer's satisfaction, that—

(1) It has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals (e.g., the types of controls required for satisfactory participation in the Department of Defense sponsored self-governance programs, specific accounting controls over indirect costs, compliance tests which demonstrate that the controls are effective, and Government audits which have not disclosed recurring instances of expressly unallowable costs); and

(2) The unallowable costs subject to the penalty were inadvertently incorporated into the proposal; i.e., their inclusion resulted from an unintentional error, notwithstanding the exercise of due care.

42.709-6 Contract clause.

Use the clause at 52.242-3, Penalties for Unallowable Costs, in all solicitations and contracts over \$500,000 except fixed-price contracts without cost incentives or any firm-fixed-price contract for the purchase of commercial items. Generally, covered contracts are those which contain one of the clauses at 52.216-7, 52.216-13, 52.216-16, or 52.216-17, or a similar clause from an executive agency's supplement to the FAR.

52.242-3 Penalties for Unallowable Costs.

As prescribed in 42.709-6, use the following clause:

PENALTIES FOR UNALLOWABLE COSTS (OCT 1995)

(a) *Definition. Proposal*, as used in this clause, means either—

(1) A final indirect cost rate proposal submitted by the Contractor after the expiration of its fiscal year which—

(i) Relates to any payment made on the basis of billing rates; or

(ii) Will be used in negotiating the final contract price; or

(2) The final statement of costs incurred and estimated to be incurred under the Incentive Price Revision clause (if applicable), which is used to establish the final contract price.

(b) Contractors which include unallowable indirect costs in a proposal may be subject to penalties. The penalties are prescribed in 10 U.S.C. 2324 or 41 U.S.C. 256, as applicable, which is implemented in Section 42.709 of the Federal Acquisition Regulation (FAR).

(c) The Contractor shall not include in any proposal any cost which is unallowable, as defined in Part 31 of the FAR, or an executive agency supplement to Part 31 of the FAR.

(d) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the Contractor shall be assessed a penalty equal to—

(1) The amount of the disallowed cost allocated to this contract; plus

(2) Simple interest, to be computed—

(i) On the amount the Contractor was paid (whether as a progress or billing payment) in excess of the amount to which the Contractor was entitled; and

(ii) Using the applicable rate effective for each six-month interval prescribed by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97).

(e) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal includes a cost previously determined to be unallowable for that Contractor, then the Contractor will be assessed a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract.

(f) Determinations under paragraphs (d) and (e) of this clause are final decisions within the meaning of the Contract Disputes Act of 1978 (41 U.S.C. 601, et seq.).

(g) Pursuant to the criteria in FAR 42.709-5, the Contracting Officer may waive the penalties in paragraph (d) or (e) of this clause.

(h) Payment by the Contractor of any penalty assessed under this clause does not constitute repayment to the Government of any unallowable cost which has been paid by the Government to the Contractor.

42.1105 Assignment of criticality designator.

<i>FAR as of FAC 90-25</i>		<i>FAR as revised</i>	
Contracting officers shall assign a criticality designator to each contract in the space for designating the contract administration office, as follows:		Contracting officers shall assign a criticality designator to each contract in the space for designating the contract administration office, as follows:	
<i>Criticality</i>		<i>Criticality</i>	
<i>Designator</i>	<i>Criterion</i>	<i>Designator</i>	<i>Criterion</i>
A	Critical contracts, including DX-rated contracts (see Subpart 42.3), contracts citing the authority in 6.302-2 (unusual and compelling urgency), and contracts for major systems.	A	Critical contracts, including DX-rated contracts (see Subpart 11.6), contracts citing the authority in 6.302-2 (unusual and compelling urgency), and contracts for major systems.
* * * * *		* * * * *	[FAC 90-32]

SUBPART ~~42.13~~ [Reserved]

SUBPART 42.13—SUSPENSION OF WORK, STOP-WORK ORDERS, AND GOVERNMENT DELAY OF WORK

[Redesignated from Subpart 12.5 by FAC 90-32 with one minor revision and updated references]

SUBPART 42.16—SMALL BUSINESS CONTRACT ADMINISTRATION (NEW)

42.1601 General.

The contracting officer shall make every reasonable effort to respond in writing within 30 days to any written request to the contracting officer from a small business concern with respect to a contract administration matter. In the event the contracting officer cannot respond to the request within the 30 day period, the contracting officer shall, within the period, transmit to the contractor a written notification of the specific date the contracting officer expects to respond. This provision shall not apply to a request for a contracting officer decision under the Contract Disputes Act of 1978 (41 U.S.C. 601-613). [FAC 90-32]

PART 52.242-14 THROUGH PART 52.242-17

[Redesignated from 52.212-12 through 52.212-15 by FAC 90-32 with updated references]